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Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 31

NORTON I. KRETSKE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES

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Petitioner Kretske's answer to the Government as to the sufficiency of the evidence against him.

The Government's interpretation of the effect of the evidence against Kretske is as follows: "Petitioner Kretske concedes (Pet. 3, Br. 3-4, 8-11) the existence of sufficient evidence against him." (Gov. Br. 11.) This is an unfair statement upon the position of Kretske in his brief p. 3, which is as follows: "Suffice it to say, that the

testimony of the Government was mainly that of accomplices, whether indicted, or unindicted, and it was characterized by inconsistency, contradictoriness, and such lack of convincingness, as would ordinarily render it impotent to convince a jury. It was further uncorroborated by any but accomplice witnesses, who in their attempted corroboration, generally contradicted each other. This type of testimony would be insufficient to support a verdict in the Eighth Circuit, as shown by the cases of *Sykes* v. *United States,* 204 Fed. 909, and *Dahly* v. *United States,* 50 F. (2d) 37.

It is clear from the above that Kretske does not concede the sufficiency of the evidence against him.

Kretske's Point X untouched in the brief of the Government.

May we respectfully direct the attention of the Court to the fact that in the Brief of the Government embracing one hundred and fifty-three pages, this point is passed unnoticed. The Petitioner considered this point as tendering an issue involving a most serious and prejudicial error. This point is based on assignment number 10 in reasons relied upon for allowance of the writ (Pet. 8) and specification of errors J. (Br. 11, 82.)

The point is stated as follows (Subdivision A, Br. 82):

> "Where evidence of acts disconnected with a conspiracy is admitted, the same is reversible error available to any defendant prejudiced thereby",

and five cases, including *Prettyman* v. *U. S.,* 180 Fed. 30 (C. C. A. 6), *U. S.* v. *Sprengel,* 103 Fed. (2d) 876 (C. C. A. 3), and *Minner* v. *U. S.,* 57 Fed. (2d) 506 (C. C. A. 10), were cited in support of it. In this regard we assert that the admission of the evidence embraced by this point was reversible error as to all defendants.

This point is based upon the testimony of the Government witness Alexander Campbell (R. 680-689). This witness, over very specific and exhaustive objections to his testimony (R. 678-680, 717), testified, in part, that he was an Assistant United States Attorney for the Northern District of Indiana. An indictment had been returned on April 25, 1938, in that District charging Edward Wroblewski and William Wroblewski, with a conspiracy to violate the revenue laws of the United States. On September 30, 1938, petitioner Roth called at the office of witness in the Federal Building in Fort Wayne, Indiana, and stated that he desired to talk about two clients of his, the Wroblewski brothers of Chicago, who had been indicted in that District. Roth then left, but shortly thereafter had another conversation in front of the Federal Building in which Roth allegedly said to Campbell, "Well, Mr. Campbell, if you find, when you check the records that the Wroblewskis are not indicted, and that their case has not been presented to the Federal Grand Jury, isn't there some way that some arrangement can be made that they will not be indicted? Isn't there some way we can handle this so that it does not have to be presented to the jury?" To which Campbell allegedly answered: "No, these Wroblewski brothers, if they are not indicted, their case will be presented in due course to the Federal Grand Jury, and if there is sufficient evidence the Grand Jury will probably indict them, and if they are indicted, they will be prosecuted." Roth allegedly further stated: "Well, isn't there some arrangement we can make? Isn't there some way we can handle this? I know all about Grand Juries. I know how they work, and isn't there some way some arrangement can be made to handle this case?" To this Campbell allegedly said: "No, Mr. Roth, that cannot be done, be-

cause the United States Attorney has a policy of presenting all cases to the Federal Grand Jury: that case will be presented in the regular channel as every other case is." Roth allegedly then said: "Well, suppose I raise my fee $500 or $1,000, and give it to you to handle this case." To this Campbell allegedly said: "No, that is not being done in the Northern District of Indiana, that is not the way we operate." Roth then allegedly said: "Well, if you don't want to take the money yourself to handle this case, in that way, this is a campaign year, and I assume you have campaign assessments to pay, the fall campaign coming on, and if you don't want to take this money yourself, use it for your campaign assessment." To this Campbell allegedly said, "No, Mr. Roth, that is not the way we operate in the Northern District of Indiana." Roth allegedly answered, "Well, that is the way we handle cases in Chicago sometimes." To this Campbell allegedly rejoined: "I don't care how you do it in Chicago, that is not the way we do it in Indiana."

It is clear that this testimony tended to show, if believed, a separate and distinct criminal act, executed independently of a conspiracy to defraud the United States of the conscientious service of Glasser in the Northern District of Illinois. Its prejudicial character is clearly apparent and it must be considered as having a vitally prejudicial bearing upon the verdict of the jury. Also it is apparent that the jury believed this testimony. As apparent is it that the Wroblewski case concerning which this asserted attempt to corrupt and bribe was made. was a separate offense occurring in the Northern District of Indiana. It was clearly isolated from the conspiracy charged in the indictment, as clearly disclosed by the

record. Under even the liberal rules of admissibility in conspiracy cases, this should have been rigorously excluded.

In *Prettyman* v. *U. S.*, 180 Fed. 30, 36, *supra*, it was held that where separate offenses were admissible as tending to prove a charge of conspiracy, these offenses must have been participated in by all the defendants charged in the indictment with the conspiracy.

Certainly these particular alleged acts of Roth are not the acts of Glasser and Kretske, against whom they were admitted; hence, their admission cannot be supported upon the basis of the rule permitting the showing of other offenses in appropriate cases.

In *U. S.* v. *Sprengel*, 103 Fed. (2d) 876 (C. C. A. 3), *supra*, the court reversed a conviction in a case where the guilt of the defendants was amply demonstrated, because there was so much error in the record and so many instances of prejudicial matter having been placed before the jury that the accused had not been tried in accordance with the substance and forms of law. Two of the errors assigned were almost identical with the one we are discussing. The first error was that a competing group of conspirators had attempted to bribe a Registrar of Wills. The second was the admission of a number of bulletins gotten out by a person but vaguely connected with the conspiracy charged. As to this the court at pp. 881, 882 said:

> "There was no testimony to show that the appellants were in any wise responsible for the sending of these bulletins in evidence through the mails or aided in their preparation or publication. These were the work of Baker alone, unaided by the appellants or their co-conspirators. The effect of these bulletins upon the minds of the jury must have been far

> reaching in indicating the existence of fraud because the statements are plainly fraudulent."

What must have been the effect upon the jury in the instant case when there was introduced before it, evidence of an alleged attempt to bribe an Assistant United States Attorney in regard to the prosecution of a violation of the United States liquor laws?

The same ruling under practically the same circumstances was had in *Minner* v. *U. S.*, 57 Fed. (2d) 506, *supra*, where the court at p. 512 said:

> "Counsel for Minner assert that the court erred in admitting the testimony of Armstrong as to the transaction between him and Norton in behalf of Nelson. The evidence shows that this was a separate and distinct conspiracy. It did not show that it was connected with or related to, or in furtherance of the conspiracy charged. *It was not admissible in this case for any purpose.*" (Italics supplied.)

All of these cases are cited at page 82 of Petitioner Kretske's Brief (Point X, Subdivision A).

To these cases may be added many other decisions covering the same point and in each case reversing a judgment in cases where separate offenses were introduced in evidence. *Boyd* v. *U. S.*, 142 U. S. 450, 458, 35 L. Ed. 1077; *U. S.* v. *Dressler*, 112 F. (2d) 972; *Nigro* v. *U. S.*, 117 F. (2d) 624, 632 (C. C. A. 8); *Walker* v. *U. S.*, 104 F. (2d) 465; *Laughlin* v. *U. S.*, 92 F. (2d) 506 (C. C. A. D. C.); *Melaragno* v. *U. S.*, 88 F. (2d) 264 (C. C. A. 3); *Simpkins* v. *U. S.*, 78 F. (2d) 594; *McLafferty* v. *U. S.*, 77 F. (2d) 715 (C. C. A. 9); *Frantz* v. *U. S.*, 62 F. (2d) 737; *Conkston* v. *U. S.*, 51 F. (2d) 178 (C. C. A. 9); *Flood* v. *U. S.*, 36 F. (2d) 444 (C. C. A. 9); *U. S.* v. *Sager*, 49 F. (2d) 725, 729 (C. C. A. 2); *Farbacher* v. *U. S.*, 20 F. (2d) 736 (C. C. A. 5); *Edwards* v. *U. S.*,

18 F. (2d) 403; *Robinson* v. *U. S.*, 18 F. (2d) 185 (C. C. A. D. C.); *Morrow* v. *U. S.*, 11 F. (2d) 256, 259, 260; *Nibblelink* v. *U. S.*, 66 F. (2d) 178 (C. C. A. 6); *Terry* v. *U. S.*, 7 F. (2d) 28 (C. C. A. 9); *Crinnian* v. *U. S.*, 1 F. (2d) 643 (C. C. A. 6); *Gart* v. *U. S.*, 294 Fed. 225 (C. C. A. 3); *McDonald* v. *U. S.*, 264 Fed. 739 (C. C. A. 1); *Enfield* v. *U. S.*, 261 Fed. 141 (C. C. A. 8); *Paris* v. *U. S.*, 260 Fed. 529 (C. C. A. 8); *Fish* v. *U. S.*, 215 Fed. 544 (C. C. A. 1).

From the foregoing it seems clear that this evidence tending to prove a separate and distinct offense, not charged in the indictment and absolutely disconnected with the conspiracy therein charged was plainly and prejudicially irrelevant and its admission prejudicial error.

Assuming, however, for the sake of argument that the foregoing testimony was relevant, we encounter this rule, stated in *Nigro* v. *U. S.*, 117 F. (2d) 624, 632, *supra:*

> "It is essential to the admissibility of evidence of another distinct offense that the proof of the latter offense be plain, clear, and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. Such evidence tends to lead juries to rest their verdicts upon false issues. It necessitates the trial of matters collateral to the main issue and is extremely prejudicial."

This rule is likewise asserted and applied in *McLafferty* v. *U. S.*, 77 F. (2d) 715, *supra; Gart* v. *U. S.*, 294 Fed. 66, *supra; Paris* v. *U. S.*, 260 Fed. 529; and *Fish* v. *U. S.*, 215 Fed. 544.

The substance of the testimony of the witness Campbell was that an indictment was returned on April 25, 1938, in the District in which he officiates against the Wroblewski brothers, charging them with a conspiracy to vio-

late the internal revenue laws of the United States. Five months later, in September, Roth allegedly approached him and asked him whether these brothers had been indicted in his District, and if they had not, whether or not some arrangement could be made to prevent this, and allegedly suggested a bribe of $500 or $1,000 if this could be done. Upon the refusal of the witness to make such arrangement, Roth allegedly said that is the way we handle cases in Chicago sometimes.

The uncontradicted facts are as follows:

1. That the Wroblewskis were indicted in the Northern District of Indiana on April 25, 1938 (Ex. 186-B, R. 840).

2. That the Wroblewskis were notified in April that they were indicted in Indiana and called upon to surrender and make bond for their appearance (R. 635).

3. That on May 14, 1938, Edward Wroblewski was arrested in Chicago on a complaint for removal and gave bond for his appearance in the Northern District of Indiana to answer to the indictment and arranged bail for his brother William (R. 635). The record of the removal proceeding is found in the U. S. Commissioner's file (Ex. 186, R. 840) which contains a complaint for removal (Ex. 186-A, R. 840); a certified copy of the Indiana indictment (Ex. 186-B, R. 840); and recognizance of bail (Ex. 186-C, R. 840).

4. That in September, 1938, Roth first became acquainted with Edward Wroblewski and was then and there advised of the Indiana indictment and engaged to defend the Wroblewskis on their trial (R. 676, 838-839). Roth met William for the first time a week before the trial in Indiana (R. 844).

5. After engagement by Edward Wroblewski and be-

fore Roth went to Indiana he called at the Commissioner's office in Chicago and examined the Commissioner's file and the indictment contained therein, having been advised by his client at the time of engagement, of the removal proceedings in Chicago and the giving of bond in Chicago for appearance in Indiana for trial (R. 839). Roth introduced in evidence the public records he examined in the Commissioner's office, among which was the Indiana indictment returned April 25, 1938, as Exhibit 186-B (R. 840).

6. After examining the indictment which charged a conspiracy and again conferring with Edward Wroblewski concerning the overt acts which charged an act for which his brother William had been punished under a substantive offense a year prior thereto, Roth stated to Edward Wroblewski that he would go to Indiana and confer with the prosecutor (R. 841), to bring this to his attention with a view of disposing of the case with a recommendation of nominal punishment on a proposed plea of guilty (R. 842).

Roth testified that he had full knowledge of the indictment before going to Indiana and that he went there for the purpose of conferring with the prosecutor handling the case to bring to his attention the fact that William Wroblewski had been punished for the same acts and conduct a year prior thereto on a substantive charge, which was the subject of the overt act alleged against William in the second indictment and because of this, to try to dispose of the case on a recommendation of nominal punishment on a proposed plea of guilty (R. 842).

The testimony of Roth is inherently probable backed up by all the physical and inherent facts related to this subject matter, and is uncontradicted.

Campbell's testimony is absolutely at war with all the

probabilities in the matter to which he testified and is unbelievable and absurd.

Therefore to consider that Campbell told the truth in this matter when taking into consideration Roth's broad and varied experience as a practitioner in the federal court (R. 796, 749, 782, 783, 833-834, 889, 890) that he did in this instance, and such was his customary practice, to offer sums of $500 and $1,000 to prevent the return of indictments which he had known to have been returned for at least five months, is to assert that the writ of *"de lunatico inquirendo"* instead of an indictment would be the Government's appropriate remedy.

Wherefore, petitioner resubmits that the judgment of the lower court be reversed.

Respectfully submitted,

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